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individually and as the representative
of a class of similarly-situated persons

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Sidney Naiman, individually and as the
representative of a class of similarly-
situated persons,

Plaintiff,

v.

NewRez LLC,

Defendant.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

INTRODUCTION

1
2
3 1. Plaintiff, Sidney Naiman (“Plaintiff”), brings this action under the
4 Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227.

5 2. The TCPA was enacted in response to widespread public outrage
6 concerning the proliferation of intrusive, nuisance telemarketing practices. *See Mims v.*
7 *Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012).

8
9 3. The TCPA is designed to protect consumer privacy by prohibiting, among
10 other things, autodialed and prerecorded telemarketing calls to cellular telephones
11 without the “prior express written consent” of the called party.

12 4. Defendant made at least one automated or prerecorded telemarketing call
13 to Plaintiff using equipment prohibited by the TCPA, even though it did not have
14 Plaintiff’s prior express written consent to do so.

15 5. Plaintiff did not give prior express written consent to receive an autodialed
16 or prerecorded phone call on his cellular phone from Defendant.

17
18 6. This case challenges Defendant’s practice of initiating autodialed or
19 artificial voice telemarketing calls to cellular telephones without the prior express
20 written consent of the called parties as required by the TCPA. 47 C.F.R. §
21 64.1200(a)(2), (f)(8)(i).

22 7. Plaintiff seeks class-wide relief against Defendant for violating the
23 Telephone Consumer Protection Act, 47 U.S.C. § 227. A class action is the best means

1 of obtaining redress for Defendant's illegal calls and is consistent both with the private
2 right of action afforded by the TCPA and the fairness and efficiency goals of Rule 23 of
3 the Federal Rules of Civil Procedure.

4 8. Defendant's practice caused actual harm to Plaintiff and the other members
5 of the Class in several ways, including temporarily using their cellular phones and tying
6 up their lines, invading their privacy, causing wear and tear on their cellular phones,
7 consuming battery life, and causing some of them to be charged for calls they did not
8 want to receive. Moreover, these calls injured Plaintiff and the Class because they were
9 frustrating, obnoxious, annoying, and a nuisance, and disturbed their solitude.
10

11 **PARTIES**

12 9. Plaintiff, Sidney Naiman, is an individual and a citizen of Scottsdale,
13 Arizona.

14 10. Defendant, NewRez LLC, is a Delaware limited liability corporation and
15 financial services company headquartered in Plymouth Meeting, Pennsylvania.
16

17 **JURISDICTION AND VENUE**

18 11. Subject matter jurisdiction exists pursuant to 28 U.S.C. § 1331 because
19 Plaintiff's claims arise under the TCPA, a federal statute.

20 12. Personal jurisdiction exists in this Court because a substantial portion of
21 the conduct took place in this District, Defendant has transacted business and made or
22 performed contracts substantially connected with the State, and Defendant purposely
23 directed activities at residents within the forum.

13. Venue is proper in this District because Defendant had sufficient contacts with this District, and a substantial part of the events or omissions giving rise to Plaintiff's claim occurred in this District.

BACKGROUND AND ENFORCEMENT OF THE TCPA

14. In 1991, Congress enacted the TCPA to regulate the explosive growth of the telemarketing industry. In so doing, Congress recognized that “[u]nrestricted telemarketing ... can be an intrusive invasion of privacy[.]” Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5) (1991) (codified at 47 U.S.C. § 227).

15. When Congress enacted the TCPA in 1991, it found that telemarketers were calling 18 million Americans every day. *In re Rules and Regulations Implementing the TCPA of 1991*, 18 FCC Rcd. 14014, 14021 ¶ 8 (2003) (“2003 Order”). By 2003, telemarketers were calling 104 million Americans every day, assisted by the proliferation of new and more powerful autodialing technology. *Id.*, 18 FCC Rcd. 14014, ¶¶ 2, 8 (2003).

16. The problems Congress identified when it enacted the TCPA have only grown worse in recent years. The FCC has emphasized that action must be taken to “stop the scourge of illegal robocalls” because “U.S. consumers received approximately 2.4 billion robocalls per month in 2016.” *See* <https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing>.

**THE TCPA PROHIBITS AUTOMATED AND PRERECORDED
TELEMARKETING CALLS**

17. The TCPA requires prior express written consent for all autodialed or artificial prerecorded telemarketing calls to cellular telephone numbers. 47 U.S.C. §227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(2).

18. “The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to which the signatory authorizes such advertisements or telemarketing messages to be delivered.” 47 C.F.R. § 64.1200(f)(8).

19. “The written agreement shall include a clear and conspicuous disclosure informing the person signing that: (A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and (B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.” 47 C.F.R. § 64.1200(f)(8)(i)(A).

20. According to the FCC, “[t]he term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the

1 purchase or rental of, or investment in, property, goods, or services, which is
2 transmitted to any person.” 47 C.F.R. § 64.1200(f)(9).

3 21. Pursuant to its authority to make rules and regulations to implement the
4 TCPA, 47 U.S.C. § 227(b)(2), the FCC has ruled in a 1995 Memorandum Opinion and
5 Order that “the party on whose behalf a solicitation is made bears ultimate
6 responsibility for any violations. Calls placed by an agent of the telemarketer are treated
7 as if the telemarketer itself placed the call.” *In re Rules & Regulations Implementing the*
8 *TCPA of 1991*, 10 FCC Rcd. 12391, 12397 ¶ 13 (1995).

10 22. On May 9, 2013, the FCC released a Declaratory Ruling confirming that a
11 person or other entity that contracts out its telephone marketing “may be held
12 vicariously liable under federal common law principles of agency for violations of ...
13 section 227(b) ... that are committed by third-party telemarketers.” *In re Joint Petition*
14 *Filed by Dish Network, LLC*, 28 FCC Rcd. 6574, 6574, ¶ 1 (2013) (“*DISH Network*”).

15 23. A “seller” may be liable for telemarketing activities that it outsources, even
16 if it does not physically place the calls:

17
18 [A]llowing the seller to avoid potential liability by outsourcing
19 its telemarketing activities to unsupervised third parties would
20 leave consumers in many cases without an effective remedy for
21 telemarketing intrusions. This would particularly be so if the
22 telemarketers were judgment proof, unidentifiable, or located
23 outside the United States, as is often the case. Even where third-
party telemarketers are identifiable, solvent, and amenable to
judgment limiting liability to the telemarketer that physically
places the call would make enforcement in many cases
substantially more expensive and less efficient, since
consumers (or law enforcement agencies) would be required to

1 sue each marketer separately in order to obtain effective relief.
2 As the FTC noted, because “[s]ellers may have thousands of
3 ‘independent’ marketers, suing one or a few of them is unlikely
4 to make a substantive difference for consumer privacy.”

5 *DISH Network*, 28 FCC Rcd at 6588, ¶ 37.

6 24. Finally, the FCC has stated that called parties may obtain “evidence of
7 these kinds of relationships ... through discovery, if they are not independently privy to
8 such information.” *Id.* at 6592-93, ¶ 46. Evidence of circumstances pointing to
9 apparent authority on behalf of the telemarketer “should be sufficient to place upon the
10 seller the burden of demonstrating that a reasonable consumer would not sensibly
11 assume that the telemarketer was acting as the seller’s authorized agent.” *Id.*

12 25. Under principles of agency and apparent authority, Defendant is
13 vicariously liable for the autodialed and artificial or prerecorded¹ voice telemarketing
14 calls placed to the cellular phones of Plaintiff and the Class marketing mortgage loans.

15 26. Defendant ratified and accepted the benefits of the autodialed and
16 prerecorded telemarketing calls and it appeared to Plaintiff and the Class that was made
17 with Defendant’s authority when placing the automated and prerecorded robocalls. *See*
18 <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> (“Robocalls
19 are calls made with an autodialer or that contain a message with a prerecorded or
20 artificial voice.”).

21
22
23

¹ “Prerecorded” shall refer to “artificial or prerecorded voice” calls or messages.

FACTS

27. Advertising to cellular phones uses the called party's equipment.

28. Defendant, directly or through a telemarketer it had retained, transmitted autodialed and prerecorded calls to cellular phones—those of Plaintiff and the other members of the putative Class—to promote Defendant's products and services without the called parties' prior express written consent.

29. Defendant solicits business through robocalls to cellular phones. These robocalls are made directly by Defendant, or by a telemarketer acting on Defendant's behalf.

30. Once the autodialer connects Defendant or its telemarketer with a consumer through a robocall, Defendant or its telemarketer ultimately transfers the call to one of Defendant's mortgage consultants to solicit business.

31. The autodialer is programmed to connect only answered calls with a live person who then transfers the call to a representative of Defendant who specializes in selling mortgage products.

32. Defendant or its telemarketer called Plaintiff's cellular phone using an autodialer, which connected to a live human telemarketer who then ultimately transferred the call to Defendant's mortgage consultant.

33. On March 20, 2019, Plaintiff received an autodialed telemarketing call made on behalf of Defendant.

1 34. Plaintiff's spouse answered Plaintiff's cellular phone and said "Hello?"
2 several times. There was dead air on the other end of the call, but after she said
3 "Hello?" several times, she heard a distinctive "click" and then one of Defendant's
4 employees or contractors came on the line, took information from Plaintiff, and then
5 connected Plaintiff's spouse to one of Defendant's mortgage consultants.

6 35. Once the call was transferred, Plaintiff's spouse and Defendant's mortgage
7 consultant discussed options for financing a kitchen update.

8 36. Rather than continue the discussion by telephone, Plaintiff's spouse
9 requested that Defendant's mortgage consultant email Plaintiff with contact
10 information.
11

12 37. Later that afternoon, Defendant's mortgage consultant sent Plaintiff an
13 email with her contact information.

14 38. The distinctive pause and a "click" after Plaintiff's spouse answered is
15 evidence of the caller's use of a predictive dialer, which uses an algorithm to "predict"
16 when telemarketing agents will be available to field the call. *See* 2003 Order, 18 FCC
17 Rcd. at 14022, n. 31.²
18

19 39. The above facts demonstrate that the calls were made as part of a
20 telemarketing campaign, and that the calls were made using an automatic telephone
21 dialing system ("ATDS") and a prerecorded voice.

22 ² "[I]n 2003, the FCC expressed growing concern about the proliferation of predictive dialing
23 systems that use "a complex set of algorithms to automatically dial consumers' telephone numbers in a
manner that predicts the time when a consumer will answer the phone and the telemarketer will be
available to take the call."

1 40. The TCPA defines “automatic telephone dialing system,” or “ATDS,” as
2 “equipment which has the capacity—(A) to store or produce telephone numbers to be
3 called, using a random or sequential number generator; and (B) to dial such numbers.”
4 47 U.S.C. § 227(a)(1).

5 41. “The statutory definition of ATDS is not limited to devices with the
6 capacity to call numbers produced by a ‘random or sequential number generator,’ but
7 also includes devices with the capacity to dial stored numbers automatically.
8 Accordingly, we read § 227(a)(1) to provide that the term automatic telephone dialing
9 system means equipment which has the capacity—(1) to store numbers to be called or
10 (2) to produce numbers to be called, using a random or sequential number generator—
11 and to dial such numbers.” *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th
12 Cir. 2018).

13
14 42. Defendant (or its telemarketer) used a device that had either: (A) the
15 capacity to call numbers produced using a random or sequential number generator, or
16 (B) the capacity to dial stored numbers automatically. *Id.*

17
18 43. Defendant (or its telemarketer) initiated unauthorized telephone
19 solicitations to the cellular phones of Plaintiff and other members of the Class using an
20 ATDS or prerecorded voice to advertise the availability of a mortgage without their
21 prior express written consent.

22 44. Defendant (or its telemarketer) used an ATDS and prerecorded voice to
23 call the cellular phones of Plaintiff and other Class members to ultimately connect them

1 to one of Defendant's mortgage consultants in order to encourage them to apply for a
2 refinance or other loan, and did so without their prior express written consent.

3 45. The autodialed and prerecorded voice calls to cellular phones were
4 designed to encourage and offer Defendant's goods or services for sale, including
5 "competitive" mortgage quotes.

6 46. Neither Plaintiff nor his spouse gave Defendant Plaintiff's cellular
7 telephone number or requested that either company call his cellular phone about an
8 mortgage quote.

9 47. Neither Plaintiff nor his spouse nor anyone else acting on Plaintiff's behalf
10 expressly consented in writing to receive Defendant's autodialed or prerecorded
11 telemarketing calls to his cellular phone.

12
13 **CLASS ALLEGATIONS**

14 48. Pursuant to Fed. R. Civ. P. 23(a) and (b)(3), Plaintiff brings this action
15 against Defendant on behalf of himself and all other persons similarly situated
16 throughout the United States.

17 49. Plaintiff proposes the following class definition:

18
19 All persons in the United States to whom one or more
20 telemarketing or advertising calls were initiated (1) to their
21 cellular telephone number, (2) by or on behalf of NewRez LLC,
22 (3) using an automatic telephone dialing system or an artificial
23 or prerecorded voice, (4) on or after August 30, 2015, and (5)
without their prior express written consent.

1 50. Excluded from the class are Defendant, any entity in which Defendant has
2 a controlling interest, each of their respective officers or legal representatives, and any
3 Judge assigned to this action, including his or her immediate family.

4 51. The proposed class members are identifiable through phone records and
5 phone number databases.

6 52. Plaintiff is a member of the proposed class.

7 53. The automated technology that Defendant (or its telemarketer) used to call
8 Plaintiff's cellphone is capable of contacting thousands of people a day, and so the
9 potential class members number in the hundreds or thousands, at least. Individual
10 joinder of so many persons is impracticable.

11 54. Use of a prerecorded voice and voice prompt menu further increases the
12 scale at which Defendant (or its telemarketer) can make the calls without human
13 intervention.

14 55. There are questions of law and fact common to Plaintiff and to the
15 proposed class, including but not limited to the following:
16

17 a. Whether Defendant (or its telemarketer) used an automatic
18 telephone dialing system or an artificial or prerecorded voice to call the cellular
19 phones of Plaintiff and others;

20 b. Whether Defendant (or its telemarketer) initiated telemarketing calls
21 to cellular phones without the prior express written consent of the called parties;
22
23

1 c. Whether Defendant is liable for its telemarketers' violations of the
2 TCPA;

3 d. Whether Plaintiff and the other members of the class are entitled to
4 statutory damages under the TCPA;

5 e. Whether Defendant's actions were knowing or willful and, if so,
6 whether the Court should treble the statutory damages awarded to Plaintiff and
7 the other members of the class; and

8 f. Whether Plaintiff and members of the class are entitled to equitable
9 relief, including but not limited to injunctive relief.
10

11 56. Plaintiff's claims are based on the same facts and legal theories as the
12 claims of all class members and therefore are typical of the claims of class members.
13 Plaintiff and the other class members all received telephone calls to their cellular
14 telephone lines through the same or similar dialing system and or the same or similar
15 prerecorded voice.
16

17 57. Plaintiff is an adequate representative of the class because his interests do
18 not conflict with the interests of the Class he seeks to represent. Plaintiff is a victim of
19 ATDS telemarketing to his cellular phone using a prerecorded voice without any
20 emergency purpose and without his prior express written consent, and he is committed
21 to the vigorous prosecution of this action. Plaintiff has retained counsel competent and
22 experienced in complex TCPA class action litigation. Plaintiff will vigorously
23

1 prosecute this action. Plaintiff and his counsel will fairly and adequately protect the
2 interest of members of the class.

3 58. Common questions of fact and law predominate over questions affecting
4 only individual class members, and a class action is the superior method for fair and
5 efficient adjudication of this controversy. The only individual questions concern
6 identification of class members, which will be ascertainable from records maintained by
7 Defendant or their agents.
8

9 59. The likelihood that individual class members will prosecute separate
10 actions is remote because individual litigation of the claims of all class members is
11 economically unfeasible and procedurally impracticable given the expense involved and
12 the small recoveries available through individual actions.

13 **COUNT I - VIOLATION OF THE TELEPHONE**
14 **CONSUMER PROTECTION ACT, 47 U.S.C. § 227, ET SEQ.**

15 60. Plaintiff incorporates all preceding paragraphs as though fully set forth
16 herein, and brings Count I individually and on behalf of the class.

17 61. The foregoing acts and omissions of Defendant constitute numerous and
18 multiple violations of the TCPA, 47 U.S.C. §227, by making calls, except for
19 emergency purposes, to the cellular telephone numbers of Plaintiff and members of the
20 class using an ATDS and/or artificial or prerecorded voice.
21

22 62. As a result of Defendant's violations of the TCPA, 47 U.S.C. §227,
23 Plaintiff and members of the class are entitled to an award of \$500 in damages for each

1 and every call made to their cellular telephone numbers using an ATDS or artificial or
2 prerecorded voice in violation of the TCPA, pursuant to 47 U.S.C. § 227(b)(3)(B).

3 63. Plaintiff and members of the class are also entitled to, and do seek,
4 injunctive relief prohibiting Defendant from violating the TCPA, 47 U.S.C. §227, by
5 making calls, except for emergency purposes, to cellular telephone numbers using an
6 ATDS or artificial or prerecorded voice.

7 64. Defendant's violations were knowing or willful.

8 65. If the Court determines that Defendant's actions were knowing or willful,
9 then Plaintiff requests that the Court increase the statutory damages up to three times
10 the amount. 47 U.S.C. § 227(b)(3).
11

12 WHEREFORE, Plaintiff, for himself and all class members, requests the
13 following relief:

- 14 A. Certification of the proposed class;
15 B. Appointment of Plaintiff as representative of the class;
16 C. Appointment of Plaintiff's counsel as counsel for the class;
17 D. An order awarding statutory damages of at least \$500 per phone call at
18 issue pursuant to 47 U.S.C. § 227(b)(3)(B);
19 E. An order increasing those statutory damages up to three times (\$1,500 per
20 call at issue) pursuant to 47 U.S.C. § 227(b)(3)(C);
21 F. An order enjoining Defendant from engaging in the same or similar
22 unlawful practices alleged herein;
23

- 1 G. An order awarding costs of suit;
- 2 H. Leave to amend this Complaint to conform to the evidence presented at
- 3 trial; and
- 4 I. Orders granting any other relief this Honorable Court deems equitable,
- 5 proper, and just.
- 6

7

8 Dated: September 4, 2019

Respectfully Submitted,

9 SIDNEY NAIMAN, individually and
10 as the representative of a class of
similarly-situated persons,

11 By: /s/ Trinette G. Kent

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